sign the will, followed by the signing of Mr. Wong, and then himself (see p. 64 of notes of evidence). S. Nadarajah, was the name of the deceased.

Mr. David was cross-examined on or with reference to this point, repeatedly and extensively but he stuck to his story, first at p. 47 of the notes of evidence, then again and again at p. 49, p. 50, p. 51, p. 52, p. 59 and finally at p. 60, altogether 7 times.

Mr. Krishnan who was with the deceased throughout in the office of Mr. Wong that day said also the deceased signed first, followed by Mr. Wong and then by Mr. David. He was also cross-examined extensively but he did not budge.

I allowed Mr. David to be cross-examined so many times on the same point despite the same answers because he differed from Mr. Wong on this point, but despite his not being paid 2 months' salary by Mr. Wong and being left jobless by him, a situation as excerbating as can be for a wage earner and his family, he did not waver from his story. I took into consideration Mr. Krishnan's evidence, Mr. Krishnan had no axe to grind either. For Mr. Wong he must have attested numerous wills of clients, therefore his memory could hardly be precise on this point of detail. For Mr. David, however, it was the first time in his life that he had attested the will, his memory should be more probably reliable or precise.

I therefore preferred Mr. David's evidence on this point to Mr. Wong's. This of course did not render Mr. Wong's other evidence worthless. It would be considered in the circumstances then prevailing tested with other evidence and given its due weight.

I therefore accepted the evidence of M/s. Wong, David & Krishnan that the alleged will in this case was made by the deceased in the office of Mr. Wong on the date stated in the will and that the will was validly executed in compliance with the provisions of the Wills Act 1959 in regard to such formalities for a valid will. I made this finding after considering all the evidence especially that of the handwriting expert called by the said nephew.

For reasons given above, I gave judgment for the defendant (the said brother) with costs.

MALAYAWATA STEEL BHD.

v.

MOHD YUSOF BIN ABU BAKAR & ANOR.

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[ORIGINATING MOTION NO. 25-48-93]
3 MARCH 1994

ADMINISTRATIVE LAW: Industrial Law - Dismissal of employee - Reference under s. 20(3) of the Industrial Relations Act 1967 - Collective Agreement and general conditions - Domestic Inquiry - Whether any express conditions in collective agreement or general conditions that domestic inquiry is mandatory - Interpretation of Collective Agreement and general conditions - Section 33 of Industrial Relations Act 1967 - Scope of ss. 33(B)(1), 30(5) & 56 of the 1967 Act - Function of High Court - Duties of inferior tribunal - Excess of jurisdiction - Whether in a reference under s. 20(3), the Industrial Court has power to inquire under s. 33 of Industrial Relations Act 1967 - Certiorari - Retrial - Whether High Court in issuing order of certiorari has power to order retrial of matter in Industrial Court by mandamus.

In this case, the first respondent, an employee of the applicant was dismissed on the ground that the first respondent was alleged to be frequently absenting from work without leave. The first respondent claimed unfair dismissal and the matter was referred to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967.

The issues were:

1. Whether the Industrial Court has the jurisdiction to interpret the collective agreement and the general conditions under a reference which was made pursuant to s. 20(3), when there was no application made under s. 33 of the Industrial Relations Act 1967.
2. Whether the Industrial Court could proceed to hold its own inquiry, through evidence which was addressed before the Court as to whether the first respondent was dismissed without just cause and excuse, i.e. after having made a finding that there was no domestic inquiry.

Held:

[1] The Industrial Court is clearly vested with jurisdiction under s. 30(1)(5) & (6) of the

Industrial Relations Act 1967 to make an award "relating to all or any of the issues in dispute", to consider "any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or reference to it under s. 20(3)" of the said Act and in so doing, it "shall not be restricted to the specific relief claimed".

[2] However, the Industrial Court by its failure to act within the provisions and jurisdiction clearly conferred to it under s. 20(3), read in conjunction with s. 30(1), (5) & (6) of the said Act had in effect acted outside and without jurisdiction.

[3] The privative provision of s. 33B(1) of the Industrial Relations Act 1967 would not preclude the issue of certiorari in the circumstances, and the application to remove the proceedings of the Industrial Court to this Court was allowed. Accordingly, an order of certiorari was hereby issued to quash the Award No. 210 of 1993 of the Industrial Court.

[4] The High Court when issuing an order of *certiorari* has the power to order a retrial of the matter in the Industrial Court on specified issues, in the nature of a *mandamus* and by way of proper directions.

[5] Accordingly, this matter was ordered to be remitted back and be heard by another division of the Industrial Court on the substantial merits of the case.

[Order of certiorari issued to quash Award of Industrial Court. Retrial ordered. No order as to costs].

Cases referred to:

Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar and Restaurant Workers & Anor. [1984] 2 CLJ 6 / [1984] 1 MLJ 363 @ 371 ***(foll)***

South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors. [1980] 2 MLJ 165 ***(foll)***

Holiday Inn, K.L. v. National Union of Hotel, Bar and Restaurant Workers [1988] 1 MLJ 306 ***(foll)***

Dragon & Phoenix Bhd. v. Kesatuan Pekerja-Pekerja Perusahaaan Membuat Tekstil dan Pakaian Pualu Pinang & Anor. [1991] 1 CLJ 244 / [1991] 1 MLJ 89 ***(foll)***

Motipur Sugar Factory Private Limited. v. The Motipur Sugar Factory Private Limited AIR 1965 SC 1803 ***(foll)***

Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor. [1988] 1 CLJ 1 / [1988] 1 MLJ 111 ***(foll)***

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147 ***(foll)***

Sabah Banking Employees Union v. Sabah Commercial Bank's Association [1989] 2 CLJ 135 / [1989] 2 MLJ 286 ***(foll)***

Yee Yut Ee [1978] 2 MLJ 142 @ 144, 145 ***(foll)***

Cik Aniza Yaacob & Ors. v. Mostek Malaysia Sdn. Bhd. & Ors. [1988] 1 MLJ 451 @ 453 ***(foll)***

Northumberland's [1952] 1 AER 122 ***(foll)***

Legislation referred to:

Employment Act, s. 14

Courts of Judicature Act 1964

Industrial Relations Act 1967, ss. 20(3), 30(1), (5), & (6), 33A(1), B(1), 56(1)

Rules of the Supreme Court 1965, O. 59 r. 9(4) (UK)

Other sources referred to:

Mallal's Supreme Court Practice, para 53/1/11

For the applicant - Anand Ponnudurai; M/s. Shearn Delamore & Co.

For the respondents - N. Shanmugam; M/s. Shan & Gooi

JUDGMENT

Vincent Ng Kim Khoay J:

The first respondent was an employee of the applicant. It was alleged by the applicant that since 1988 the first respondent was frequently absenting from work without leave. The first respondent was dismissed after the applicant had duly complied with the caution system incorporated into the collective agreement (exhibit MRH 6 of Enclosure 1) the common ground of both parties being that no domestic inquiry was held before such dismissal. The first respondent then claimed unfair dismissal and the matter was referred to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967 ("the Act").

The applicant's main contention is that the Industrial Court had embarked on a mission to interpret the Collective Agreement (C.A.) and General Conditions (GC) governing the employment of the 1st respondent by holding that the two conditions - at page 13 of the CA under caption 'Union Representation at Enquiries' and at page 21 of the GC under caption 'Discipline', paragraph 2, in section XXI - made it mandatory for the applicants to hold a domestic enquiry.

There was no express conditions in the CA or GC requiring the applicants to hold a domestic

enquiry. However, the condition under Union Representation at Enquiries states as follows:

> Not more than two union officials shall be present at a disciplinary enquiry on any employee who is a union member and is covered by this agreement.

And the condition in GC under **Discipline** states:

> 2. Not more than two (2) union officials shall be invited to sit as observers at a Disciplinary Enquiry affecting an employee.

The part of the judgment of the Chairman of the Industrial Court which learned Counsel Mr. Anand Ponnudurai sought to impugn was expressed thus:

> It does appear that where dismissal is contemplated a disciplinary inquiry must be held. Both the GC and the CA provide for a Disciplinary Inquiry at which two union officials shall sit as observers.
>
> It is apparent therefore that the claimant was in fact entitled to or should have been accorded a hearing at an inquiry irrespective of whether it is called a due inquiry under the Employment Act 1955 or a Disciplinary Inquiry under the CA or GC.

And the Chairman went on further to add:

> No workman however gross his misconduct should be condemned to a dismissal without being heard. In this case there has been a breach of the rules of natural justice, a breach of the GC and a breach of the CA, both providing for union representation at inquiries.
>
> In the circumstances the dismissal of the claimant in breach of holding a disciplinary inquiry was an unfair labour practice.

The contention of the applicant is that the Industrial Court had made an error in law affecting an excess of its jurisdiction in a matter referred to it under s. 20(3) of the Act, when it proceeded to interpret the CA and GC as imposing a mandatory requirement that before an employee is dismissed a domestic enquiry must be held, as both the GC and CA do not provide for such domestic enquiry ante dismissal.

According to Mr. Anand, such interpretation of CA and GC could only be made if there was an application under s. 33 of the Act, but there was no such application and as such, the Industrial Court had no jurisdiction to make an interpretation of the CA or the GC; at the very most the said conditions in CA and GC should be taken to mean that if there was to be a domestic enquiry, then two union officials ought to be present.

The function of the High Court is not to sit as a Court of Appeal to review findings of the inferior tribunals, its only function is to consider whether the inferior tribunal has performed its duties according to law, rather than to consider the merits of the case. See *Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel Bar and Restaurant Workers & Anor.* [1984] 1 MLJ 363 @ 371. See also *South-East Asia Fire Bricks Sdn. Bhd v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors.* [1980] 2 MLJ 165. The inferior tribunal's function is only to perform duties as provided under s. 20(3) (on representations for reinstatement of workmen) s. 28 (President to regulate procedure and Proceedings of his Court), s. 33 (on interpretation of any award or collective agreement taken cognizance by the Court) and s. 56 of the Act (to adjudicate on any complaint as to non-compliance with award or collective agreement).

Stated pithily, the point canvassed by applicant's Counsel is that, the Industrial Court, by performing the function under s. 33 in a reference under s. 20(3) (whereas no question as to interpretation was referred to it under s. 33), had exceeded its jurisdiction and in such a situation it is settled law that this Court can intervene through the issue of *certiorari*. This Court's attention was also drawn to the fact that no enquiry had been conducted by the Industrial Court in order to adjudicate on the justification for the 1st respondent's dismissal. In other words, after having made a finding that there was no domestic enquiry, (that is, how the employee was dismissed), the Industrial Court did not proceed to decide on evidence adduced, whether the charges against the 1st respondent have been made out (that is, why he was dismissed).

The first issue for my decision is whether the Industrial Court had exceeded its jurisdiction when it interpreted the aforesaid conditions in the CA and GC as mandatory for the applicants to hold a domestic enquiry. And the corollary to this question being, whether in a reference under s. 20(3) it is within the ambit of an Industrial Court to interpret CA or GC.

Learned Counsel for the applicant cited the Supreme Court cases of *Holiday Inn, K.L. v. National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 and *Dragon & Phoenix Bhd. v. Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil dan Pakaian Pulau Pinang & Anor.* [1991] 1 MLJ 89 in support of his contention that an Industrial Court is precluded from interpreting a CA or GC in a reference under s. 20(3); and he asserted that the broad principle governing a case involving s. 56 is also applicable to a case under s. 20(3). I disagree with this contention as both the above cases concerned only s. 56 of the Act which specifically defines the limited ambit of the powers of the Court. In my view the wordings in s. 56 and s. 33 are so delimited so as to enable reliefs in industrial matters to be pigeonholed, so to say. In practical and simple terms, the effect of such delimitation of industrial reliefs in the two provisions is that, if the crucial issue between the parties is non-compliance with any award or any Collective Agreement then the complaint should be framed under s. 56(1) and in the event the issue concerns interpretation of any Award or collective agreement then the question referred should be framed under s. 33 and the Industrial Court's parameter of jurisdiction would thus fall only within the ambit of the two respective sections.

However, with all due respect, it is unwarranted to say that a matter that comes under s. 20(3) precludes the Industrial Court from interpreting the CA or the GC. As this interpretation clearly flies in the teeth of plain provision of s. 30 sub-sections (1), (5) and (6) (which subsection also clearly expresses that the provisions of s. 30 applies to matters of reference under s 20(3)).

The relevant sub-section of s. 30 states as follows:

(1) The Court shall have power in relation to a trade dispute referred to it or in relation to a reference to it under s. 20(3) to make an award (including an interim award) **relating to all or any of the issues.**
(2) ...
(3) ...
(4) ...
(5) The Court shall act according to equity, good conscience and the substantial merits of the case without regard to **technicalities** and **legal form**.
(5A) ...
(6) In making its award, the Court shall **not be restricted to the specific relief claimed** by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under s. 20(3) but may include in the award **any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under s. 20(3).**

In these three subsections, the Industrial Court is clearly vested with jurisdiction, to make an award **"relating to all or any of the issues in dispute"**, to consider **"any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or reference to it under s. 20(3)"** and in so doing, it **"shall not be restricted to the specific relief claimed"**. As such, I cannot understand how in the reference under s. 20(3). An Industrial Court should be limited to consider only the issues referred to it but not to the issues raising out of such issues referred considering that it has to act in accordance with the provisions in subsection (1), (5) and (6) of s. 30, which are expressly applicable to s. 20(3) of the Act.

Apparently, it is for this reason that Counsel for the applicant has failed to cite to this Court any authority other than *Holiday Inn (ibid)* And *Dragon & Phoenix Bhd. (ibid)* to support his contention that the Industrial Court had exceeded their jurisdiction in interpreting the CA and the GC.

Thus, I hold that the Industrial Court had acted well within the ambit of its jurisdiction in holding that the plaintiff was under a mandatory requirement in the CA and GC to conduct a domestic enquiry before dismissing the 1st respondent.

As such, if this be the only issue, the privative provision of s. 33(B)(1) of the Act would accordingly preclude the issue of *certiorari* by this Court in the circumstances. However, this is not the end of the matter. This Court would have to consider the second issue which had taken root during the course of my consideration of the first issue. The second issue being, whether in the light of the cases: Workmen of the *Motipur Sugar Factory Private Limited v. The Motipur Sugar Factory Private Limited* AIR 1965 SC 1803. *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor.* [1988] 1 MLJ 111. *South-East Asia Fire Bricks Sdn. Bhd v. Non-*

Metallic Mineral Products Manufacturers Employees Union & Ors. (ibid) and *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, the Industrial Court - by not acting in a manner that they are required to act under the Act - had acted beyond its jurisdiction or had produced a decision which would be a nullity.

Upon the facts of this case it is obvious that the Industrial Court had only considered how the employee was dismissed. In my view, it is not only charged with the duty to find out whether natural justice has been observed by the employer (by the holding of a domestic inquiry before an employee can be dismissed on grounds of misconduct, as required the CA and GC interpreted in the light of s. 14 of the Employment Act) but by virtue of s. 20(3) of the Act, a duty is also place on the Industrial Court itself to serve the cause of natural justice by proceeding to hold its own enquiry (through evidence led before it) to find whether the dismissal of the employee was without just cause and excuse; that is, in short, it has also to consider the substantial merits of the case, namely why the employee was dismissed. See *Dreamland Corporation Sdn. Bhd. v. Choong Chin Sooi (ibid)* which cited with approval the ratio in *Motipur Sugar Factory* case *(ibid)*, particularly, the following passage:

> Where an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify his action before the tribunal by leading all relevant evidence before it. The entire matter would be open before the tribunal. It will have jurisdiction not only to go into the limited questions open to the tribunal where domestic inquiry has been properly held, but also to satisfy itself on the facts adduced before it by the employer whether the dismissal or discharge was justified. The important effect of omission to hold an enquiry is merely that the tribunal would not have to consider only whether there was a *prima facie* case but would decide for itself on the evidence adduced whether the charges have really been made out.

This course of action, the Industrial Court is obliged to take in a reference under s. 20(3), as the absence of a domestic inquiry or the presence of a defective domestic inquiry is not a fatality, but merely an irregularity; though nevertheless, I must hasten to reiterate that the Industrial Court had acted within jurisdiction and was eminently correct in coming to the conclusion that holding a domestic enquiry is mandatory, considering the implicit aspect of the wording of the said conditions in the CA and GC in conjunction with the mandatory requirement of an enquiry under s. 14 of the Employment Act. In such situation, it is open to the employer to justify his action before the Industrial Court. Surely, s. 30(5) of the Act which requires the Industrial Court to "act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form" entails that if there is some misconduct on the part of the workman, good conscience alone will require the Court to enquire into and to adjudicate on the justification for the employee's dismissal; such enquiry does not have to be with the full trappings of a criminal Court trial.

Section 33B(1) of the Act provides that:

> ... an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under s. 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any Court.

In Malaysia (see *Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel Bar and Restaurant Workers (ibid)* and *Sabah Banking Employees Union v. Sabah Commercial Bank's Association* [1989] 2 MLJ 286), in Singapore (see Re: Application by *Yee Yut Ee* [1978] 2 MLJ 142 @ 144, 145 in England (see *Anisminic Ltd. v. Foreign Compensation Commission (ibid)*) - A House of Lords decision, as well as the Privy Council decision in the Malaysian case of *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union 6 Ors. (ibid)*), the Courts have been averse to give a literal interpretation to such a privative or finality clause. Thus the Courts have sought to neutralize the effects of these privative clauses, on the rational that a decision arrived at in excess of legal powers (or if the Industrial Court had done or failed to do something in the course of the inquiry which it ought to or ought not to do) was no decision at all and could not be saved by any privative clause, however strongly worded it may be. Thus, it is settled that Court should give an expansive rather than narrow or strict interpretation to such ouster clauses in statutes.

Because there is a need to ensure that Industrial Courts function according to the law that

conferred its authority to decide, and upon the well established principle that a creature of statute are cloathed with such powers only as are conferred on it by the statute which created it, it is consistently argued and held by the Courts that such privative clauses cannot shelter the actions of the Industrial Court from judicial review.

In *Yee Yut Ee (ibid)*, the sentiment expressed by Choor Singh J. was as follows:

> When the right to *certiorari* had been taken away by statute, the Court relied upon the proposition that Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior Court.

In *Sabah Banking Employees Union* case Abdul Hamid Omar LP had this to say:

> It is fundamental to the Court's constitutional and common law role as guarantors of due process and fair administration of the law.

And in the landmark case of *Anisminic Ltd.* the House of Lords had this to say on the concept of "jurisdictional errors" vis-a-vis privative clauses such as the current s. 33B(1) of the Act: (per Lord Pearce. At page 195).

> Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged in a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions,- or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

And at page 171 Lord Reid said:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where although the tribunal had jurisdiction to enter on the inquiry it had done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

The general principle of jurisdictional errors was laid down in the decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation* Commission and restated in *Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel Bar and Restaurant Workers & Anor.* as follows:

> When words in a statute oust the power of the High Court to review decisions of any inferior tribunal by *certiorari* they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if it has done or failed to do something in the course of inquiry which is of such a nature that its decision is a nullity.

The above cases have now settled as law, the proposition that where the Industrial Court had done something **or failed to do** something (as in this case) in the course of the inquiry which is of such a nature that its decision is a nullity, it has committed a jurisdictional error. And in my view a decision is in the nature of a nullity if it fails to observe its expressed obligations under s. 30(1), (5) and (6) of the Act.

In the event, there is more than sufficient data on the record for this Court to herein hold and I so hold, that the Industrial Court had produced a purported decision which was a nullity, in having failed to proceed to hold its own enquiry through evidence led before it as to whether the 1st respondent was dismissed without just cause and excuse - after having found that there was no such enquiry - when that

Court is clearly obliged (under s. 30(1), (5) and (6) of the Act) to act according to equity, good conscience and **substantial merits** of the case on any matter or things which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under s. 20(3). In this regard I hold that matters referred under s. 20(3) ought also to encompass matters arising out of the matters referred to, during the trial. On this ground of nullity of decision alone this Court could issue an order of *certiorari*.

But, further and in the alternative I would also hold that by its failure to act within the provisions and jurisdiction clearly conferred to it under s. 20(3) read in conjunction with s. 30(1), (5) and (6), the Industrial Court had in effect acted outside and without jurisdiction, indeed, off at a tangent, such that it ran foul of the dicta in *Dreamland's* case *(ibid)* - a contradiction in terms, apparently; a teaser in semantics probably, but yet amply supported by case and legislative law.

Upon both the grounds above, considered jointly or separately, I hold that the privative provision of s. 33B(1) of the Act would not preclude the issue of *certiorari* in the circumstances, and I allow the application to remove the proceedings of the Industrial Court to this Court, and an order of *certiorari* is hereby issued to quash the Award No. 210 of 1993 of the Industrial Court.

Now, the resultant question that this Court is faced with, in a situation where the inferior tribunal had failed to consider certain matters which it ought to have considered; is whether the High Court has the power, upon the issuing of an order of *certiorari* to quash the decision, to also consequentially make an order or direction remitting the matter for a rehearing (as in this case) on the substantial merits of the case. Defective decisions are often quashed by certiorari without any consequential order of mandamus presumably upon the assumption that if its decision is annulled, the deciding authority will recognise that it must begin again. See *Cik Aniza Yaacob & Ors. v. Mostek Malaysia Sdn. Bhd. & Ors.* [1988] 1 MLJ 451 @ 453

In a case where a *certiorari* order is issued basically on the ground that the inferior tribunal had failed to consider certain matters which it ought to have considered then the cardinal question to be posed is would the tribunal have come to a different decision if it had considered those matters. If one can say with utmost certainty that it would have given a different decision then the matter would have ended with just the order of *certiorari*. But in the interest of justice if there is a probability, however marginal it may be, that the tribunal could, even after considering the matters it had earlier omitted to consider, come to the same or similar decision, then the matter ought to be remitted to the tribunal with an order or direction in the nature of a mandamus to compel the tribunal to consider the matter or matters it ought to have considered that is as in our current case the substantial merits of the case. Unfortunately, we do not have any Malaysian decision where this additional power of the High Court has been explored or explained.

The English Rules of the Supreme Court 1965 under O. 59 r. 9(4) have a provision empowering the Court to remit the matter to the tribunal. There is no such provision in our Rules of the High Court 1980. Mallal's **Supreme Court Practice** under para 53/1/11, however, cites *Northumberland's* case [1952] 1 AER 122 to say that there is a power to order a retrial. (In *Northumberland's* case see page 127 para H to page 128 para A). In *Northumberland,* Dennings LJ (as he then was) gave a particularly apt and rational answer - to the argument that the Court of King's Bench may well be usurping to itself an appellate jurisdiction which has not been given to it, should it intervene to correct the decision of a statutory tribunal by ordering it to hear the case again - when he said in his speech as follows:

> The answer to this argument however is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals not in an appellate capacity but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which on the face of it offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a Court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

It is also important to note that the Courts of Judicature Act 1964 at paragraph 1 in the schedule provides that when dealing with prerogative writs the High Court has the power to issue any directions or orders for any purpose. It is therefore clear that the High Court when issuing an order of *certiorari* has the power to order a retrial of the matter in the Industrial Court on specified issues, in the nature of a mandamus and by way of proper directions.

Thus, consequentially this Court further orders that this matter be remitted back and be heard by another division of the Industrial Court on the substantial merits of the case.

As the first respondent cannot be held responsible for this impugned state of affairs, there shall be no order as to costs. It is hoped that this matter is taken up on appeal if only with the view to development of the law.

MD. ZAINUDDIN B. MD. DARUS & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL APPEAL NO. 52-191-92]
31 DECEMBER 1993

CORRUPTION: Appellants convicted for offence under s. 3(a)(i) Prevention of Corruption Act 1961 - Trap witness - Requirement for independent corroboration - Tape recorders - Conversation of complainant and both appellants recorded by tape recorders - Failure to introduce tape recorders - Section 114(g) Evidence Act 1950 - Whether adverse inference should be invoked against prosecution - Whether order of a re-trial justified.

EVIDENCE: Adverse inference - Section 114(g) Evidence Act 1950 - Tape recorders recorded conversation between complainant and accused persons in corruption case - Tape recorders in possession or power of prosecution - Withholding of evidence - Whether adverse inference should be invoked against prosecution for failure to produce tape recorders.

This was an appeal by the appellants against their conviction and sentence for an offence under s. 3(a)(i) of the Prevention of Corruption Act 1961 read with s. 34 of the Penal Code. The appellants were each sentenced to one day's imprisonment and fined RM2,000 in default six (6) months' imprisonment. Hence this appeal.

Held:

[1] In the present appeal, the two tape recorders would surely shed light as to what actually transpired at the JPJ office and at the Court premises. The two tape recorders were in the possession or power of the prosecution and they saw it fit to withhold it.

[2] It would not be incorrect to say that the contents of the two tape recorders could, of course, have been of vital importance because had it recorded the entire conversation between the first appellant and the complainant at the JPJ office and between the second appellant and the complainant at the Court premises, it would have been overwhelming corroboration of the complainant's version of the conversation given by both the accused persons.